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(No. 27163.)

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1920.

No. 125.

VANDALIA RAILROAD COMPANY, PLAINTIFF IN ERROR,

vs.

GUSTAV A. SCHNULL, WILLIAM J. GRIFFIN, AND GEORGE G. GRIFFIN, COMPOSING THE FIRM OF SCHNULL & COMPANY, ET AL., DEFENDANTS IN ERROR.

IN ERROR TO THE SUPREME COURT OF THE STATE OF INDIANA.

BRIEF FOR PLAINTIFF IN ERROR.

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STATEMENT OF THE CASE.

Defendants in error brought this suit in the Superior Court of Marion County, Indiana, against plaintiff in error, for a mandatory injunction to prevent plaintiff in error from charging any rates for the handling and transportation of certain

classes of property, designated as first, second, third, fourth, fifth and sixth classes, over its line of railroad between Indianapolis, Indiana, and the Indiana-Illinois state line, and between intermediate stations, in excess of the rates fixed by the order of the Railroad Commission of Indiana entered on December 14, 1906, effective February 1, 1907, upon the petition of the defendants in error, to which plaintiff in error was respondent. (The order is at pp. 46-47 of Record.)

In the Superior Court the defendant (plaintiff in error) answered the complaint by a general denial and by a second paragraph as follows:

"Paragraph 2. For a further and second paragraph of answer to plaintiffs' complaint, Vandalia Railroad Company, defendant herein, says:

That the rates specified in the order mentioned in said complaint and which was made and entered by the Railroad Commission of Indiana on the fourteenth (14th) day of December, 1906, and which by its terms was to become effective on the first (1st) day of February, 1907, will not yield to defendant revenue sufficient to reimburse defendant for its actual cost and outlay in handling and carrying the classes of property specified in said order of said Railroad Commission, and provide a fair return to defendant on the value of defendant's property used and employed in handling and carrying the classes of property in said order specified.

And defendant further says that under Section 1 of Article 14 of the Constitution of the United States defendant cannot be lawfully deprived of its property without due process of law, nor be deprived of the equal protection of the laws; and that if the rates specified in said order of the Railroad Commission

of Indiana be enforced defendant will be compelled to handle and carry said classes of property in said order specified without deriving or receiving therefrom revenue sufficient to pay the actual cost to defendant of handling and carrying said classes of property and provide a fair return to defendant on the value of defendants property used and employed in handling and carrying said classes of property, and defendant will thereby be deprived of its property without due process of law, in violation and contravention of said Section 1 of Article 14 of the Constitution of the United States.

Wherefore, defendant says that the rates specified in said order of said Railroad Commission of Indiana, and likewise said order, are illegal and void, and prays to be hence dismissed and that it have judgment herein against plaintiffs for all its costs and charges herein laid out and expended."

The plaintiff demurred to this paragraph of answer, on the statutory ground that it does not state facts sufficient to constitute a cause of defense to the cause of action set forth in the complaint, which was sustained by the Superior Court, to which ruling the defendant excepted. Upon the trial in the Superior Court judgment was rendered against the defendant, granting the injunction as prayed for in the complaint. From this judgment plaintiff in error appealed to the State Supreme Court, where the judgment of the Superior Court was affirmed.

(The court's opinion is in the record at pp. 104-112; 122 N. E. Rep. 225.)

The question involved, is this: If the rates fixed by the order of the Commission in question will not produce revenue sufficient to reimburse the carrier for the actual cost and outlay in handling and carrying the classes of property specified

in the order and provide a fair return to the carrier on the value of its property used and employed in performing the service, is the order constitutional and valid?

Plaintiff in error contends that it is unconstitutional and void because the carrier cannot lawfully be required to carry this segregated traffic without remuneration for that service, regardless of what its revenue may be from the carrying of other traffic.

Defendants in error contend, as we understand their position, that if the carrier receives from carrying and handling all its intrastate traffic, for the carrying of which the rates are established by orders of the state commission, including the carrying of the classes of property specified in the order in question, revenue sufficient to remunerate the carrier for the carrying and handling of all such traffic, then said order is valid, notwithstanding that the rates fixed in the order may not produce revenue sufficient to compensate the carrier for performing the service in carrying and handling the traffic specified in the order.

This question is raised by the ruling of the Superior Court in sustaining the demurrer to plaintiff in error's second paragraph of answer to the complaint and the affirmance of that ruling by the judgment of the State Supreme Court.

In the State Supreme Court the defendants in error urged the further point that the second paragraph of answer was not sufficient to withstand the demurrer because the allegation that the rates were confiscatory related to the time of the filing of the answer, without any allegation that such rates were confiscatory at the time of the filing of the complaint, which, as they contend, is a tacit concession that at the time of the bringing of the suit the rates were compensatory, and since which time they have become confiscatory. It seems to us clear that

there is no merit in this point, and we do not believe that counsel will urge it here. Indeed, in their brief in the State Supreme Court they said: "The question is not of any serious consequence; but we submit that the answer in these terms was not a full answer to the complaint."

THE ERRORS RELIED UPON.

The errors relied upon and intended to be urged by plaintiff in error are as follows:

1. That the Supreme Court of Indiana erred in holding and deciding that the rates specified in the order of the Railroad Commission of Indiana, set forth in the complaint, were valid and lawful rates, and said order a valid and lawful order, when applied to the facts set up in the second paragraph of answer to the complaint.

2. That the Supreme Court of Indiana erred in holding and deciding that the facts set up in the second paragraph of answer to the complaint do not state a cause of defense; and in affirming the ruling of the Superior Court in sustaining the demurrer to said paragraph of answer.

3. That the Supreme Court of Indiana erred in holding and deciding that if a carrier receives in the aggregate a fair remuneration on all of its business, it has no cause to complain of rates prescribed by the order of the State Railroad Commission on segregated classes of property, which rates are in themselves unremunerative.

4. That the Supreme Court of Indiana erred in holding and deciding that plaintiff in error has no basis for complaint of the order of the Railroad Commission of Indiana made and entered on the 14th day of December, 1906, and of the rates therein prescribed for handling and carrying the classes of property speci-

fied in said order, even though such rates would not yield to plaintiff in error revenue sufficient to reimburse it for its actual cost and outlay in carrying said classes of property and provide a fair return on the value of plaintiff in error's property used and employed in handling and carrying said classes of property, if the plaintiff in error derives in the aggregate, from all of its intrastate business, a fair remuneration on all of its investments and property within the State of Indiana.

5. That the Supreme Court of Indiana erred in holding and deciding that the order of the Railroad Commission of Indiana, made and entered on December 14, 1908, was not in violation and contravention of Section 1 of Article XIV of the Constitution of the United States.

BRIEF OF THE ARGUMENT.

The schedule of rates fixed by the Railroad Commission's order are approximately 34 per cent less than the rates which plaintiff in error was charging at the time the order was entered for the carrying and handling of the classes of property specified in the order.

Plaintiff in error alleges in its answer to the complaint that the rates established by the order are confiscatory. The demurrer to this answer admits the facts alleged as to the confiscatory character of the rates. The State Supreme Court by its decision holds that even though these rates are confiscatory plaintiff in error has no cause to complain if it receives in the aggregate a fair remuneration on all of its Indiana business.

We cannot believe that it is essential to a complete and valid defense to such a suit as we have here that the carrier must allege and prove that its revenue derived from all of its intrastate traffic, or from all of such traffic for the carrying of which the rates are fixed by orders of the state commission, is insufficient to pay the cost of carrying such traffic and leave a sufficient sum to give it a fair return upon the value of its property used in carrying all of such traffic. We maintain that in such a case it is a sufficient defense for the company to allege and prove that the rates fixed by the state commission's order for the carrying and handling of the segregated traffic are in and of themselves confiscatory. That is, that the revenue received from the carrying and handling of that traffic will not yield revenue sufficient to pay the cost of *that* service and leave to the carrier a sum sufficient to give it a fair return upon its property used and employed in such service. In other words, we contend that the State has no power to segregate a certain class of railroad traffic and require the carrier to carry and handle

that traffic at unremunerative rates. Since the carrier is entitled to receive a fair return upon the value of all of its property used for the benefit of the public, to hold that a carrier may be required to carry a part of its traffic at a loss would mean that that loss must be made good by rates imposed upon other parts of its traffic.

In *Northern Pacific Ry. Co. v. North Dakota*, 236 U. S. 585, the court, in discussing a similar question, said this: "It does not aid the argument to urge that the State may permit the carrier to make good its loss by charges for other transportation. If other rates are exorbitant, they may be reduced. Certainly, it could not be said that the carrier may be required to charge excessive rates to some in order that others might be served at a rate unreasonably low. That would be but arbitrary action." (P. 598.)

It would be neither fair nor just to require shippers of one class of property to pay more than a just and reasonable rate in order to make good a loss sustained by the carrier on traffic required to be carried at less than cost. The contrary doctrine would be repugnant to the constitutional safeguards for the protection of property.

The offense against these constitutional guaranties is just as clear and pronounced, we submit, in a case where the carrier is by the State required to use a part of its property in carrying a part of its traffic without remuneration as in a case where the carrier is required to use all of its property in carrying all of its traffic without remuneration. A man has the same constitutional protection against the taking by the State of an acre of his land without due process of law and without just compensation as he has against the taking of his entire farm. It will not do to say in answer to this that because a railroad company is a corporation serving the public and therefore sub-

ject to regulation by the State of its duties and obligations it cannot claim the protection of these constitutional safeguards as can the individual man. For while the corporation's duties and obligations in serving the public are subject to regulation, it holds its property under the same constitutional protection as does the individual. Corporations are persons, within the meaning of the Fourteenth Amendment, guaranteeing all persons due process of law and the equal protection of the laws. *Southern Ry. Co. v. Greene*, 216 U. S. 400.

To deprive of the use of property is to deprive of the property itself.

We believe that the question involved in this record is settled in favor of our contention by the decision in the North Dakota case above cited.

The legislature of North Dakota fixed maximum intrastate rates, graduated according to distance, for the transportation of coal in carload lots. While those rates governed all intrastate coal shipments, their practical application was almost solely to lignite coal. The carriers refused to put the rates into effect, and the Attorney-General of the State brought proceedings in the State Supreme Court and obtained a mandatory injunction against the Northern Pacific, and other Railway Companies. The companies answered, among other things, that the statute infringed the Fourteenth Amendment by fixing rates that were unremunerative, unreasonable and confiscatory. The Supreme Court of the state overruled this contention and granted the injunction. When the case reached this court on writ of error, the decree of the state court was affirmed without prejudice to the right of the railroad companies to reopen the case after an adequate trial of the rates. (216 U. S. 579.)

After the case was remanded to the state court it was reopened, voluminous testimony was taken, and the state court,

making its separate findings of fact as to the effect of the rates in the intrastate business of each carrier, and stating its conclusion of law, entered judgment commanding the carriers to keep the rates in force. The case again reached this Court on writs of error sued out by the Northern Pacific Company and the Minneapolis, St. Paul & Sault Ste. Marie Railway Company. This Court reversed the decree, holding that the State exceeded its authority in enacting the statute, which amounted to an attempt to take the property of the carriers without due process of law, in violation of the Fourteenth Amendment.

In course of the opinion the Court said:

"The public interest cannot be invoked as a justification for demands which pass the limits of reasonable protection and seek to impose upon the carrier and its property burdens that are not incident to its engagement. In such a case, it would be no answer to say that the carrier obtains from its entire intrastate business a return as to the sufficiency of which in the aggregate it is not entitled to complain." (P. 595.)

Again:

"Frequently, attacks upon state rates have raised the question as to the profitableness of the entire intrastate business under the state's requirements. But the decisions in this class of cases (which we have cited in the margin) furnish no ground for saying that the State may set apart a commodity or a special class of traffic and impose upon it any rate it pleases, provided only that the return from the entire intrastate business is adequate." (P. 599.)

And again:

"It has repeatedly been assumed in the decisions of this Court, that the State has no arbitrary power over the carrier's rates and may not select a particular commodity or class of traffic for carriage without reasonable reward." (P. 601.)

In concluding the opinion the Court said:

"To repeat and conclude: It is presumed,—but the presumption is a rebuttable one—that the rates which the State fixes for intrastate traffic are reasonable and just. When the question is as to the profitableness of the intrastate business as a whole under a general scheme of rates, the carrier must satisfactorily prove the fair value of the property employed in its intrastate business and show that it has been denied a fair return upon that value. With respect to particular rates, it is recognized that there is a wide field of legislative discretion, permitting variety and classification, and hence the mere details of what appears to be a reasonable scheme of rates, or a tariff or schedule affording substantial compensation, are not subject to judicial review. But this legislative power cannot be regarded as being without limit. The constitutional guaranty protects the carrier from arbitrary action and from the appropriation of its property to public purposes outside the undertaking assumed; and where it is established that a commodity, or a class of traffic, has been segregated and a rate imposed which would compel the carrier to transport it for less than the proper cost of transportation, or virtually at cost, and thus the carrier would be denied a reasonable reward for its service, after taking into account the entire traffic to which the rate applies, it must be concluded that the State has exceeded its authority." (P. 604.)

On the same day that the North Dakota case was decided, the Court handed down its opinion in *Norfolk & Western Railway Company v. Conley, Attorney-General*, 236 U. S. 605, in which it is held, following the decision of the North Dakota case, that while the State has a broad field for the exercise of its power in fixing intrastate rates of common carriers, it may not require the carriers to carry passengers at a rate which affords such a narrow, if any, margin over the cost of the traffic that it is forced to carry, if not at or below cost, with merely a nominal reward.

The latest case bearing upon this question is *Brooks-Scanlon Company v. Railroad Commission of Louisiana*, decided February 2, 1920, 40 Supreme Court Reporter, p. 183, citing the North Dakota and Norfolk & Western cases above referred to, which we think supports our contention.

As to the point urged by the defendants in error in the State Supreme Court, that the second paragraph of answer was not a full answer because it was not alleged that the rates were confiscatory at the time of the filing of the complaint, we submit that the question is not whether the rates were confiscatory at the time the complaint was filed, but at the time the Court should be called upon to consider the evidence and decide the case.

It would not be a defense to show that the rates were confiscatory at the time the suit was brought, for whatever the facts were proved to be at that time the court would not be justified in holding that the defendant had established its defense of the confiscatory character of the rates unless it were further proved that at the time of the hearing of the case the rates were then confiscatory. The rates might have been fully remunerative at the time the suit was brought and wholly unremunerative, owing to changed conditions, at the time the court should be called upon to render its decision; or, on the other hand, the rates might have been unremunerative at the time the suit was brought, and amply remunerative at the time the case was submitted to the court for decision. Hence it must necessarily be that the question to be determined in such a case, as to the remunerative or unremunerative character of the rates, must be determined as of the date when the evidence is heard and the cause submitted for decision.

The following cases seem to settle this question against the contention of defendants in error; *Wilcox v. Consolidated Gas*

Co., 212 U. S. 19, 52; *Northern Pacific Ry. Co. v. North Dakota*, 216 U. S. 579, 581; *Norfolk & Western Ry Co. v. Conley, Attorney-General*, 236 U. S. 605; Minnesota Rate Cases, 230 U. S. 352; Missouri Rate Cases, 230 U. S. 474.

Respectfully submitted,

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